No. 93-648

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

COUNTY OF MURRAY, GEORGIA, BILL HANSIRD AS FORMER SHERIFF OF MURRAY COUNTY, MONTE CHASTAIN AND ROBERT BISHOP,

Petitioners,

against

JOHNNY VINEYARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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I. QUESTION PRESENTED

Whether Petitioners received a fair trial when objections were sustained and curative instructions were given after counsel for Respondent made reference to the Rodney King video tape during closing argument and later argued to the jury that their verdict would send a message to the people and politicians of Defendant Murray County, Georgia.

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IV. STATEMENT OF THE CASE

This case involves alleged improper closing argument by Respondent where objections were sustained and curative instructions were given. Petitioners basically contend that certiorari should be granted in order to severely limit the discretion of all trial judges in giving curative instructions in lieu of granting a mistrial. The facts of this police brutality case involve the brutal beating of Plaintiff while he was handcuffed to a hospital bed, resulting in a severely broken jaw. Petitioners Chastain and Bishop physically abused Respondent despite their knowledge that Respondent had acute heart problems and a pacemaker. [*See generally*, App. pp. 3a-6a of Petition For Writ of Certiorari (Hereinafter "Petition")]. Defendant's Motion for Summary Judgment was denied. [App. pp. 31a-38a of Petition].

During closing arguments, Plaintiff's counsel made brief reference to the so-called Rodney King video tape by telling the jury that the video tape that they had seen on television brought the issue of police brutality to the forefront of news across the country, but that there was no video tape in this case, and that the jury had been given the task of listening to all of the evidence presented in this case and trying to decide the best they could what happened on the morning of July 29, 1988. [App. p. 54a of Petition]. Following a delayed objection by Defense counsel, the Court sustained the objection and gave curative instructions to the jury, as follows:

> What happened in California, even though he didn't mention California, that's where it happened, really doesn't have anything to do with

> this case. This case has to be tried upon the evidence in this case. So go ahead.

[App. p. 54 of Petition].

Closing argument then continued. Petitioners' counsel later objected to Respondent's closing argument when Respondent's counsel stated:

> The reason that punitive damages are so important is because the punitive damages send a message to everybody in Murray County. They send a message to the politicians there, the sheriff that is in office there, and the deputies that are involved there. You, by your verdict today, if you find that Johnny was beaten by the deputies, you'll send a message back to them. If you return a low verdict with low or no punitive damages, you'll tell them that you have given them your approval for this kind of behavior and that it's okay to occasionally beat a fellow up like this.
>
> If you return a large verdict and tell the sheriff it's time to get some of those policies and procedures in effect so this won't happen again, tell the deputies think twice before you get into this kind of situation and use excessive force on a fellow. You'll tell the politicians there.

[App. p. 66a of Petition]. At this point, Petitioners' counsel objected and moved for a mistrial, arguing that the cumulative effect of the "Rodney King" argument together with the "send a message" argument was prejudicial. [App. p. 67a of Petition].

The Court denied the motion for mistrial and again gave sufficient curative instructions, as follows:

> Ladies and Gentlemen, let me interrupt you just a moment to point out to you that the purpose of a verdict is not really to send messages out to people. The purpose of a jury verdict, if it is awarding damages, is to compensate a Plaintiff if he is entitled to an award of damages, and in some instances, it may be appropriate to award punitive damages, and if it is appropriate to award punitive damages, then that is done to punish a Defendant or Defendants, and that's the real purpose of the damages, if its appropriate to award them. So go ahead Mr. Dean.

[App. p. 67a of Petition].

At the Pretrial Conference on January 9, 1992, Defendants had indicated they would file motions in limine concerning evidence or statements regarding other civil actions and other verdicts regarding police brutality involving these Defendants. [App. pp. 43a-44a]. During this conference, discussion was directed to reference to verdicts in other cases, more specifically the "Wagon Train Case", which involved one of the deputies involved in this action, as well as the sheriff and county herein. These pretrial discussions revolved solely around prohibition of Respondent's counsel in revealing this previous jury verdict to the jury in the case *sub judice*. [App. pp. 43a-44a of Petition].

During pretrial motions, Defendant's counsel stated:

> . . . to send a message to the law enforcement agencies or the sheriff's around the state or to the deputy sheriff's around the Northern District of Georgia or anywhere else other than the parties of this case would be totally inappropriate.

[App. p. 2a-3a].

The Court ruled by stating:

> [C]ounsel have indicated that their reference to sending any messages would be limited to a matter that would not be offensive to the rules of the Court, so I'll deny the motion in limine.

[App. p. 4a].

There were no other significant objections, motions, or rulings involved in this case.

V. REASONS FOR DENYING THE WRIT

A. Arguments by Respondent's counsel were not improper.

It is well established that counsel may properly argue and comment on self-evident facts and matters of common knowledge outside the record. *See*, 88 C.J.S. § 181(b). In *Harris v. Pacific Floor Mach. Mfg. Co.*, 856 F.2d 64 (8th Cir. 1988), that Court held that the reading of an article by Ann Landers to the jury during closing arguments in a negligence action was not improper. The Court stated that there was nothing improper in a civil case when attorneys cite widely recognized authorities during their closing argument. In the case at hand, all of the jurors had indicated during voir dire that they had viewed the Rodney King video tape. As is made clear by Petitioners throughout their brief, because of the publicity generated, the video tape itself had to be within the common knowledge of all jurors. Nothing said by Respondent's counsel about this highly publicized matter was improper. No evidence of the Rodney King beating was introduced. No reference was made to any other civil action. No new

information was given to the jury outside their own common knowledge. No violation of any pretrial ruling was made. No court ruling was disregarded.

It is also well recognized that when punitive damages are involved, "send a message" arguments are entirely proper. *See, Smith v. Wade,* 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). In *King v. Macri,* 993 F.2d 294 (2nd Cir. 1993). Appellants argued that the punitive damage awards were unduly enhanced as a result of prejudice stemming from the fact that the trial occurred soon after the state court trial of the police officers accused of beating Rodney King in Los Angeles. Counsel for the Plaintiff in that case argued in summation that a punitive damage award should be given so that Defendants would no longer think they were above the law and that because they have a badge and they have a uniform they could violate people's rights and that the punitive damage award would send the same message to others in a position to abuse their authority. The Eighth Circuit Court held that similar remarks are made in summations in most police misconduct trials and are entirely appropriate. The Court further held that the temporal proximity of this trial to the state court Rodney King verdict is not a basis for limiting the normal scope of advocacy. *Id.*

In the case *sub judice,* the Petitioners' motion in limine was to prevent Respondent from asking the jury to send a message to other unrelated law enforcement agencies and officers. Respondent's counsel agreed to limit its "send a message" argument to Murray County, which was done. [App. p. 66a of Petition]. There was no violation of any court ruling on this point and nothing was said that offended the rules of the Court.

B. Assuming arguendo, that the arguments of Respondent's counsel were improper, which Respondent denies, they were effectively cured, and did not provide grounds for mistrial.

Even if any of the comments made by Respondent's counsel were considered improper, curative instructions appropriately dealt with the situation. *See, U.S. v. North,* 910 F.2d 843, 847 (D.C. Cir. 1990); *Edwards v. City of Philadelphia,* 860 F.2d 568 (3rd Cir. 1988); *Joan W. v. City of Chicago,* 771 F.2d 1020 (7th Cir. 1985); *Spray-Right Serv. Corp. v. Monsanto,* 684 F.2d 1226, 1246 (7th Cir. 1982), aff'd 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

Under federal law, a trial judge is given considerable discretion to control the tone of counsel's arguments. Absent abuse of discretion, the decision of the trial court, which has had the opportunity to hear the offensive remarks within the context of the argument and to view their affect on the jury, should not be disturbed. *Allstate Ins. Co. v. James,* 845 F.2d 315, 316 (11th Cir. 1988). In *Allstate,* cited by Petitioners, it was held that failure of the trial judge to sustain an objection regarding closing remarks of insurer's counsel that suggested that the jury had the power to control the cost of insurance through a verdict for the insurer, and the refusal to provide limiting instructions after the inflammatory remarks constituted reversible error. In the case *sub judice,* however, the trial Judge did sustain Petitioners' objections, and proper curative instructions were given correcting any wrong that may have occurred. [App. pp. 54a, 67a of Petition]. Further, no objection was made to the curative instructions

when given and Petitioners' counsel himself acknowledged that curative instructions regarding reference to the Rodney King video tape were appropriate. [App. p. 68a of Petitioners' brief]. In affirming the District Court's denial of mistrial, the Eleventh Circuit properly considered "the entire argument, the context of the remarks, the objection raised, and the curative instruction to determine whether the remarks were 'such as to impair gravely the calm and dispassionate consideration of the case by the jury.' " *Allstate Ins. Co. v. James*, 845 F.2d 315, 318 (11th Cir. 1988) (*Spach v. Monarch Ins. Co. of Ohio*, 309 F.2d 949, 953 (5th Cir. 1962)). [App. pp. 14a-15a of Petition]. The Court below concluded that: "The District Judge had the opportunity to observe and control the tone of the argument and to determine its impact on the jury. The challenged arguments were not clearly violative of the Pretrial Order, and the Court gave curative instructions to avoid any prejudice that might otherwise have resulted from the argument." [App. p. 17a of Petition]. As recognized by the court below, the trial court should have the opportunity to rectify errors while it is possible to do so without ordering a new trial. *Gonzales v. Volvo of America Corp.*, 734 F.2d 1221, 1229 (7th Cir. 1984). Discretionary latitude must remain with the trial courts.

Courts are particularly reluctant to set aside jury verdicts because of argument made by counsel during closing arguments because harm from those arguments may be cured not only by curative instructions, but also by the Court's general charges to the jury that the attorney's arguments are not evidence. *See, Allstate*, 845 F.2d at 318; *Dickson v. International Harvester Co.*, 754 F.2d 573 (5th Cir. 1985); *Raucci v. Town of Rotterdam*, 902 F.2d 1050

(2nd Cir. 1990); *Royal Ins. Co. of America v. United Parcel Service, Inc.*, 147 F.R.D. 15 (E.D.N.Y. 1992); *Davis v. Wal-Mart Stores, Inc.*, 967 F.2d 1563 (11th Cir. 1992).

In *Solorio v. Atchison* T&SF R. Co., 224 F.2d 544 (9th Cir. 1955), Defense counsel for the railroad made extremely inflammatory remarks during his closing argument and stated that the only reason the railroad was being sued was because it was a "deep pocket". Plaintiff's counsel objected and the judge instructed the jury not to consider this remark. The Appeals Court held that this argument was not abusive and inflammatory and did not appeal to the sympathy, passion, racial, religious, social, class or business prejudice, and did not constitute reversible error due to the Judge's curative instruction.

In the case *sub judice*, there were only two isolated instances complained of by Petitioners in the motion for mistrial. Both instances, which were during closing argument, were objected to by counsel and the trial judge promptly issued sufficient curative instructions. Therefore, the Trial Judge did not abuse his discretion in denying Petitioner's motion for mistrial and the court below did not err when it upheld the District Court's award. Petitioners did receive a fair trial and were not unduly prejudiced by any remarks of Respondent's counsel.

C. The Eleventh Circuit ruling below is clearly consistent with previous rulings.

The Petitioners incorrectly state that the Eleventh Circuit's ruling in this case is inconsistent with *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir. 1990). In

McWhorter, the trial judge focused on an improper argument which contained a theory eliminated at Pretrial. Despite the lack of an objection, the Trial Judge granted a new trial. The Eleventh Circuit stated that they could not say that the District Judge abused his discretion in determining that the interest of substantial justice mandated a new trial. The Court went on to state that they recognized that curative instructions do not always eradicate the prejudice resulting from an improper argument and that is a matter left largely to the discretion of the trial judge in determining whether its instructions were sufficient to erase the prejudice resulting from the argument. *McWhorter* is entirely consistent with the Eleventh Circuit's opinion in the case at hand. Both cases adhere to the principle that the trial judge is given considerable discretion in controlling the tone and substance of counsel's argument. Due to the fact that the trial judge has the best opportunity to hear the remarks in their context and view the effect on the jury, the trial judge's ruling should not be disturbed absent an abuse of this discretion. Furthermore, this same basic principle regarding the discretion of the trial judge is applied uniformly throughout the United States, including those cases to which Petitioners have referred as supportive of their misplaced position that the Eleventh Circuit decision conflicts with other circuits and state courts. A careful analysis of those cases reveals that no such conflict exists.

The Petition for a Writ of Certiorari itself sets out to do exactly what Petitioners accuse Respondent of trying to do at trial: inflame the audience with passion and confusion and to prevent a decision based upon the

merits of the case.[1] Petitioners' brief also requests guidance from this Court to "address notorious emotional events and their impact on the fairness of a trial." In essence, Petitioners request that this Court define "notorious emotional events" for use in all trials, and that this Court create a hard and fast ruling that whenever these "notorious emotional events" are referenced in closing argument, that a mistrial would be the unavoidable result.

Petitioners would have this Court strip trial courts across the country of their discretion in determining the sufficiency of curative instructions as opposed to requiring a new trial. Any such ruling would only confuse the current standard regarding judicial discretion and would ignore the competency of the trial judge to control the tone and manner of the trial based upon his own observations and experiences. As a result of any such "guidance," the judicial system would be crippled by a

---

[1] Petitioners devote a considerable amount of attention in their brief to the riots and related destruction caused as a proximate result of the Rodney King video tape and to various other publications and articles concerning the subject. However, the citations only tend to underscore the fact that these issues were within the common knowledge of the jurors and any references by Respondent's counsel necessarily would have had very little, if any, impact on those jurors. Petitioners' counsel also makes reference to the fact that Respondent had petitioned for approximately $130,000.00 attorneys fees and expenses, while agreeing to accept a much lessor amount. Petitioners omitted from this immaterial reference that Respondents' petition included a request for a 100% fee enhancement. In fact, Petitioners' counsel agreed to pay Respondent's counsel $57,500.00 in attorneys fees and expenses, which is almost the entire amount requested, less the enhancement.

multitude of cases being unnecessarily retried. Further, such a rule would stifle competent counsel from referring to matters which are within the common knowledge of the jurors. Therefore, the ruling espoused in this case by the Eleventh Circuit is not only consistent with other jurisdictions and with other Eleventh Circuit court cases, but it is in keeping with common sense. Petitioners do not suggest any different rule that could be fashioned to apply to the facts of this case while providing useful guidance for others.

VI. CONCLUSION

Based upon the above-stated authorities, Petitioners have failed to show sufficient grounds for the grant of a Writ of Certiorari. The rulings in question by the trial judge and the court below were correct. Arguments by Respondent were not improper. Even if considered to be improper, the statements in question were properly and adequately cured by the District Judge. Further, the rulings of the Eleventh Circuit Court of Appeals were entirely consistent with previous Eleventh Circuit rulings and with the reasoning applied throughout all circuits. The issues involved in this case are extremely fact sensitive and were dealt with appropriately by the trial judge, based upon his own observations and experiences. No conflicts exist between the decision of the court below and other United States Court of Appeals. No decision has been made deciding this case in any manner that conflicts with the decision of any other State Court of last resort or United States Court of Appeals. No important question

of federal law is involved. Therefore, Petitioners request for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

VOLUME I – January 9 and 21, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOHNNY VINEYARD.

Plaintiff,

vs. 4:89-CV-149 HLM

COUNTY OF MURRAY, GEORGIA,
WILLIAM HANSIRD, ROBERT BISHOP
and MONTE CHASTAIN,

Defendants.

Transcript of proceedings in the above-styled cause reported before the Hon. Harold L. Murphy on January 9, 21, 23, 24, 27, and 28, 1992.

APPEARANCES:

MR. GREGORY KINNAMON
and MR. JEFFREY DEAN,
on behalf of plaintiffs;

MR. J. ANDERSON DAVIS
and MR. RICHARD CROMARTIE,
on behalf of defendants.

Reported by:

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[p. 20] to hide behind the fact he was on a nerve prescription, I plan to get into that quite extensively and I think the Court would allow me to do that.

He indicated in his deposition, although he was on that medication, he didn't have any problem remembering the events or certain portions of the events, at least, and if he claims now that he was hindered during that deposition, obviously I'll be quite surprised and shocked.

THE COURT: Okay. All right. You had a motion, you had responded to his. You responded as you wanted to his?

MR. DAVIS: Yes, sir.

MR. DAVIS: I think we have agreed as to defendant's motion in limine as to –

MR. KINNAMON: 1,2,3 and 5. We have no problem with.

THE COURT: All right.

MR. DAVIS: There were some of the matters that I raised at the pretrial conference.

THE COURT: All right. You want to speak to the balance of them then?

MR. DAVIS: As to number 4, Your Honor, the send a message argument, I have set that out as prohibiting counsel for plaintiff making an argument to the jury at the close of the evidence or at any time to send a message in order to [p. 21] deter or punish other than those that are parties in this case to send a message to the law enforcement agencies or to the sheriffs around the

state or to the deputy sheriffs around the Northern District of Georgia or anywhere else other than the parties of this case would be totally inappropriate.

If there is going to be some argument of punishment under the exemplary damages, which may be permissible should the evidence allow it, I think it would only be as to the parties involved in the case and not to someone else.

As to number 6, just a general limine in having counsel, wherein we have gone through a discovery process and having counsel approach us and say where are those documents, you know, there are various ways in which they could have gotten documents. We have provided a number of documents, but to give any kind of impression to the jury we have now tried to hide any documents or anything like that is what I'm trying to prohibit there or to limit.

THE COURT: All right. How about the next one.

MR. DAVIS: Number 7 has to do with the expert witness which the plaintiffs plan to call as a police practices expert. We took Mr. White's deposition in Tallahassee, Florida. Mr. White, in his deposition, admitted that he would not testify as to who was telling the truth or who wasn't telling the truth and we're trying to prohibit him

* * *

[p. 27] deny your motion in limine on it. I can handle it with an objection if it's inadmissible.

I believe number 8 is no problem. He's not going to attempt to bring out the fact that a couple of other firms may have been contacted prior to getting present counsel.

The fact he was on medication, I'll not grant the motion in limine. Doesn't have any relevance unless it's made relevant, but I'll not grant a motion in limine on it.

On the defendant's motions in limine, counsel have indicated that their reference as to sending any messages would be limited to a matter which would not, and in a manner that would not be offensive to the rules of the Court, so I'll deny the motion in limine.

I'll deny your motion in limine with reference to number 6. The Court doesn't see the need to grant that. I would expect counsel, if they want any documents or want to make any demand for documents that are in the possession of counsel, that they do it like they're supposed to, privately ask counsel for them. If they don't privately ask counsel for them, then the Court has the ability to handle it.

I'll deny your motion in limine with reference to doctor – well, to Mr. White or Dr. White? I don't know how he's going to be questioned. And the Court can handle the problem with objections, if any evidence is objectionable.

I'll instruct counsel for the plaintiff not to talk

* * *